SOH ENG KENG v. LIM CHIN WAH

[O.C.J. (Wan Yahya J.) March 1, 1979]

[Melaka — Civil Suit No. 5 of 1972]

Contract — Moneylending transaction — Agreement unenforceable and void — Whether lender is entitled to restitution of amounts actually loaned — Moneylenders Ordinance, 1951, s. 15 — Contracts Act, 1950, ss. 2(g) and 66.

In this case the plaintiff claimed against the defendant the sum of $34,790 and interest in respect of what he called a friendly loan. The issues which arose in the case were whether the loan transaction had contravened the Moneylenders Ordinance and if so whether the plaintiff was nevertheless entitled to restitution of the amounts actually loaned.

Held: (1) on the facts the defendant had proved that the plaintiff was an unlicensed moneylender, and it followed therefore that section 15 of the Moneylenders Ordinance rendered the agreements between the parties unenforceable and that such agreements would be held void by virtue of section 2(g) of the Contracts Act, 1950;

(2) the plaintiff was an unlicensed moneylender who had contravened section 15 of the Moneylenders Ordinance and who had loaned that money at excessive interest contrary to section 22 of the Ordinance and who was aware at all times of the nature of his transactions. His claim both in respect of the principal and interest, was unenforceable and void and must be dismissed.

Cases referred to:-

(1) *Menaka* v. *Lum Kum Choon* [1977] 1 M.L.J. 91.

(2) *Suu Lin Chong* v. *Lee Yaw Seong* [1979] 2 M.L.J. 48.

(3) *Kasumu & Ors.* v. *Baba-Egbe* [1956] 3 All E.R. 266.

(4) *Barclays* v. *Prospector Mortgages* [1974] 2 All E.R. 672.

CIVIL SUIT.

S.G. Thakurta for the plaintiff.

F.H. D'Cruz for the defendant.

Cur. Adv. Vult.

Wan Yahya J.: In this case the plaintiff's claim against the defendant is for the sum of $34,790 and interest in respect of what he calls a 'friendly loan'. In the particulars set out in his statement of claim he itemised nine transactions on varying dates on which he claimed various sums of money were loaned to the defendant. In the course of his evidence in chief, however, he conceded that two of the items — one for $600 and the other for $690 — were in fact payments towards interest.

The system of these loan transactions, as related by the plaintiff himself, is as follows. Whenever a loan is requested for and granted, the defendant or his fiancee would make out a cheque for the amount loaned plus a sum representing one month's interest at 3% per mensem as evidence of loan and probably for what it is worth, a collateral. These cheques were either drawn on the account of a transport company of which the defendant was a co-proprietor, or on the personal account of his fiancee.

The defendant denied that any part of the loans or interests were outstanding. He averred that he had paid interest regularly until some time in 1969 and that the interests claimed were excessive, harsh and unconscionable and had therefore contravened section 22 of the Moneylenders Ordinance, 1951. There was also another side issue raised, that is, as the collaterals were merely drawn on the cheques of the transport company, the loans were in fact made to that company and not to the defendant. On the second issue, I do not consider it necessary to go far into its merits, as this matter was not expressly pleaded in the defence and was only taken up impromptu by counsel at the hearing. Moreover, the neat pile of personal correspondence from the defendant to the plaintiff speaks in unmistakable terms that the loans were made at his behest.

I think it would be fair to conclude that the only worthy issues remaining at the end of the hearing were firstly whether the loan transaction had contravened the Moneylenders Ordinance and secondly, if so, whether the plaintiff is nevertheless entitled to restitution of the amounts actually loaned.

On the first issue I do not think the defendant need entirely rely on the presumption under section 3 of the Moneylenders Ordinance. There is ample evidence to show that the plaintiff had numerous transactions not only with the defendant but with many other persons and, to use the plaintiff's own expression, "who are in difficult positions or when their assets were frozen." It was not disputed that in respect of the loans the plaintiff charged interest at 3% per month or 36% per annum, a percentage which is sufficiently high when compared with the 12% and 18% per annum allowable under the Moneylenders Ordinance. In the various loan transactions to the defendant the plaintiff had adopted the same system, i.e., accepting cheques as evidence of loans, including first month's interest on the cheques, dating cheques on dates of issue of loans and charging similar interest rates.

In respect of the defendant alone there were a total of 9 continuous transactions, not mentioning the few which the plaintiff admitted could have taken place. There appears to be system and continuity in plaintiff's moneylending transactions.

In the light of the foregoing I have no hesitation in holding that the defendant has proved that the plaintiff was an unlicensed moneylender and that the plaintiff had not succeeded in rebutting that evidence.

It follows, therefore, that section 15 of the Moneylenders Ordinance would render the agreements between the parties unenforceable and such agreements would correspondingly be held void by virtue of section 2(g) of the Contracts Act, 1950.

For obvious reasons Mr. Thakurta, counsel for the plaintiff, did not press too hard with his arguments on this issue but contended that the plaintiff would, nevertheless, be entitled to restitution of the money loaned by virtue of section 66 of the Contracts Act. He relied on the Privy Council case of *Menaka* v. *Lum Kum Chum.*[1] I had the occasion to discuss this case recently in the case of *Suu Lin Chong* v. *Lee Yaw Seong*[2] which was on appeal before this court. In that case I held that section 66 of the Contracts Act did not necessarily apply to every moneylending transaction which had contravened section 15 of the Moneylenders Ordinance and I see no reason why I should depart from that view now.

Menaka's case was decided on slightly different facts to the present one. In that case the plaintiff,

a licensed moneylender, had lent some money to the defendant through her attorney on the security of a certain charge on his land. The learned trial judge had found that, although that transaction was void under section 8(b) and (c) of the Moneylenders Ordinance, because it was conducted personally by the attorney and not by the licensed moneylender, the Plaintiff was, nevertheless, entitled to restitution of the amount loaned as both parties were unaware of the illegality at the time of making the loan transaction and had prepared and executed the documents in complete good faith. The transaction was only found to be unenforceable and therefore void after the proceedings had commenced. In ordering restitution the learned judge was clearly relying on section 66 of the Contracts Act, 1950, which reads:

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

To my mind, this section has to be applied with care and is not open to indiscriminate use by unlicensed moneylenders whose claims have been defeated by reason of the contravention of the provisions of the Moneylenders Ordinance, 1951. Section 66 of the Contracts Act is not intended to override those provisions of the Moneylenders Act which make contracts in moneylending transactions void but is meant to provide some relief to a party whose right in an agreement has become unenforceable through no fault of his own making.

I am of the firm opinion that the words 'discovered' and 'becomes' appearing in section 66 above are not superfluous words used by the legislators. On the contrary, they are words inserted in that section for a specific reason and that is to qualify or restrict the type of agreement to which that section will apply. As I have said in the earlier case, the term "discover' here clearly indicates something which the parties were unaware of at the time of making the agreement and which they gained sight of or detected subsequently and the word 'becomes' refers to something not present when the contract was signed but came into being at a later stage. The rationale behind Their Lordships' approval of the trial judge's application of section 66 is better illustrated by the reproduction hereunder of the short but pertinent passage of the Privy Council judgment in *Menaka's* case:

"Their Lordships are therefore of opinion that the contract and the security, having been made in contravention of section 8, are unenforceable. As the contract is not enforceable by law, it is void under section 2(g) of the Contracts (Malay States) Ordinance, 1950. Neither party was aware of the illegality at the time of making the loan transaction and the documents were prepared and executed on both sides in complete good faith. The contract was 'discovered' to be void only after these proceedings had been started. Section 66 of the Contracts Ordinance therefore applies and both parties before this Board accepted that it does. . . ."

I am also of the opinion that the effect of interpreting section 66 otherwise would be tantamount to rendering section 8 and 15 of the Moneylenders Ordinance nugatory and defeating the object of that legislation. If that be the law, then the statutory restriction over the vice of uncontrolled moneylending will be forever removed and unlicensed moneylenders will rejoice at the prospect of getting a second bite at the cake. Even if caught by the provisions of the Moneylenders Ordinance, the offender has yet the Contracts Act to fall on for the restitution and possibly for the future use of his nefarious implement.

For the above reasons I would say that section 15 of the Moneylenders Ordinance is not only restrictive but also punitive in nature. It is there to prevent moneylenders from enforcing their illegal interest as well as to deprive them from recovering any sum of money outstanding in the borrower's hands.

In the case of *Kasumu & Ors.* v. *Baba-Egbe*[3] the Privy Council, in considering section 19 of the Nigerian Moneylenders Ordinance which contain somewhat similar restrictions as in our Ordinance, observed that a defaulting money lender not only incurs a monetary penalty for the offence but also loses any right to take legal proceedings to recover the money he has lent. This principle has been cited and applied in the case of *Barclays* v. *Prospector Mortgages.*[4]

In our present case the parties were well aware of what the transactions were. Both parties knew that the plaintiff had no moneylenders licence. The plaintiff had attempted to hide the illegality of the transaction behind the cloak of the expression 'friendly loan'. I hold, therefore, that the plaintiff was an unlicensed moneylender who had contravened section 15 of the Moneylenders Ordinance, and who had loaned out money at excessive interest contrary to section 22 of the Ordinance, and who was aware at all times of the nature of his transactions. His claim, both in respect of the principal and interest, is unenforceable and void. As to the verbal prayer for restitution under section 66 of the Contracts Act made by his counsel, I hold that the same had no merit for reasons above stated. A moneylender, who has committed an offence and entered into an unenforceable contract, should be treated no better than a person who has entered into an illegal contract.

The claim is accordingly dismissed with costs.

Claim dismissed.

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